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Mclvor, Claire

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GETTING DEFENSIVE ABOUT POLICE NEGLIGENCE: THE *HILL* PRINCIPLE, THE HUMAN RIGHTS ACT 1998 AND THE HOUSE OF LORDS

CLAIRE McIVOR*

I. INTRODUCTION

As far as negligence liability is concerned, the English courts have always been very protective of the police. Following the seminal House of Lords decision in *Hill v. Chief Constable of West Yorkshire*,¹ their standard response to any allegation of police negligence – no matter how loosely related to the investigation or prevention of crime – is to pull out the policy card, and to use a simple defensive practice argument to deny the existence of a duty of care. Whether the defensive practice argument has ever been a convincing one in the context of the police function is a matter for debate. There is at least some evidence to suggest that, at the time of the *Hill* decision in the late 1980s, the courts tended to adopt a rather rose-tinted view of the British police force; a view which, in light of failings highlighted by recent public inquiries,² would now be subject to direct challenge.³ More importantly, the validity of the argument is increasingly being tested by the diverse range of contexts in which it is now being called into use, in terms of both the precise nature of the allegation of police negligence being made, and the specific aspect of the multifaceted police function being targeted. For although it was conceived as a tool to protect the police from indeterminate claims brought the public at large for harm inflicted by the criminal conduct of third parties, it is now being stretched to cover claims brought by claimants who were not merely foreseeable victims, but also have some further special status (e.g. as a prosecution witness) and even claims which allege positive police misfeasance. A further challenge to the practice of using this type of policy reasoning to justify the imposition of a *de facto* immunity is the increasing use being made of the alternative cause of action against public authorities created by the Human Rights Act 1998 (hereafter “HRA”).

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¹ [1989] A.C. 53.

² See especially text accompanying note 28 below (MacPherson Inquiry).

³ Note the recognition of this point by Lord Steyn in *Brooks v Commissioner of Police*: “[n]owadays a more sceptical approach to the carrying out of all public functions is necessary” [2005] 1 W.L.R. 1495 at [28].

The tenability of this police immunity principle requires urgent reassessment. A perfect opportunity to carry out such a reassessment was recently provided to the House of Lords by the conjoined appeals in *Chief Constable of Hertfordshire Police v. Van Colle and Smith (FC) v. Chief Constable of Sussex Police*.⁴ Both cases directly concerned the applicability of the so-called “*Hill* principle” which they raised in the context of claims both in common law negligence (*Smith*) and under the HRA (*Van Colle*). Regrettably, though perhaps not surprisingly, the House of Lords declined to make use of the opportunity. With the exception of Lord Bingham (who delivered a partially dissenting speech), the presiding Law Lords refused to engage in any kind of critical evaluation of the principle, choosing instead to bluntly uphold its validity. However there were clear echoes of doubt in at least three of the majority speeches, and the tone of each of the speeches was distinctly defensive. It cannot have escaped the awareness of their Lordships that the traditional justification for the *Hill* immunity has been ringing hollow for quite some time now.

The main problem with the English legal approach to police immunity is that it is too broad-brush. While there are strong policy reasons against the imposition of negligence liability in certain contexts, these contexts are both easily identified and limited in nature. Outside of these contexts, there is no real reason for treating police defendants any differently to any other public authority defendant. The ordinary principles of negligence are perfectly capable of limiting liability to all but the most meritorious of cases. In terms of defining the proper remit of the immunity principle, the English courts would benefit from looking at the approach taken by at least some of their Australian counterparts. In this respect, the recent judgment delivered by Campbell J.A. in *State of New South Wales v. Tyszak*⁵ will be referred to as a particularly clear and accurate account of the relevance of *Hill*.

I. THE *HILL* IMMUNITY PRINCIPLE

Hill v. Chief Constable of West Yorkshire is known to tort students as the famous “Yorkshire Ripper” case. It involved an action against the police brought by the mother of the last victim of a notorious serial killer (the “Yorkshire Ripper”). The mother alleged that the police had

⁴ [2008] UKHL 50.

⁵ [2008] NSWCA 107. It should be noted that Campbell J.A.’s judgment was a minority one in the sense that the majority (Mason P. and Giles J.A.), while arriving at the same outcome, based its reasoning on breach issues rather than on the duty of care. Nevertheless, Campbell J.A.’s judgment was by far the most lengthy (with Mason P. in fact merely agreeing with the short judgment delivered by Giles J.A.) and, more importantly, the one most frequently cited with approval by subsequent courts. See, for example, *Cumming v. State of NSW* [2008] NSWSC 690 at [57] and [58] per Harrison As.J. and *State of NSW v. Spearpoint* [2009] NSWCA 233 at [10] per Ipp J.A. and at [27] per Allsop A.C.J. I am grateful to Harold Luntz for bringing the latter case to my attention.

been negligent in failing to identify and capture the killer before he had a chance to murder her daughter. In the preceding five year period, the Ripper had already killed 12 young women in the Yorkshire area. The claim failed firstly on the basis that there was insufficient proximity between the police and the daughter. The police had not had any personal dealings with her and she had not been singled out at any time as being more at risk from the killer than any other young female in the area. Secondly the claim was said to be defeated by the public policy arguments of defensive practice and diversion of police resources.

The defensive practice argument encapsulates the idea that the threat of liability will cause individuals who provide valuable services to the community to begin acting in an excessively cautious manner. The idea is that these individuals will take extra time and use additional resources in an attempt to eliminate even the most unlikely risks, adopting what may be colloquially described as an unnecessarily wasteful “belt and braces” approach to the performance of their tasks, and that this will impact detrimentally on the provision of the valuable service. Thus the entire community will suffer as a result. Such arguments tend to be wholly conjectural.⁶ Certainly, the House of Lords in *Hill* did not refer to any actual evidence in support of the applicability of the defensive practice argument to the police function. Quite evidently, it may just as easily be argued that the threat of liability will produce exactly the opposite effect, in that it will motivate individuals to do their jobs better and therefore result in improved levels of service for the community. Giving the lead speech of the House in *Hill*, Lord Keith acknowledged this possibility but rejected it on the basis that “[t]he general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it.”⁷ As indicated already, history has since revealed that Lord Keith’s faith in the general benevolence of the police was, at best, overly optimistic.

The diversion of resources argument is perhaps more tenable in that it is at least objectively verifiable. For it is obvious that it costs both time and money to defend any legal action. And where police defendants are concerned, this will involve the depletion of already limited public funds. However, this argument is generally applicable to

⁶ Indeed, as pointed out by Burton, in the context of the policing of domestic violence cases at least, the available empirical evidence would tend to undermine, rather than lend support to, the idea that the police will provide better victim protection if they are protected from civil liability. See M Burton, “Failing to Protect: Victims’ Rights and Police Liability” (2009) 72 M.L.R. 283.

⁷ [1989] A.C. 53 at 63.

all public body defendants and in practice it appears to have carried little general weight. It is certainly not common practice for it to feature as a central defence argument. As the recent decisions in both *Van Colle* and *Smith* demonstrate, the *Hill* public policy immunity principle has come to be associated almost exclusively with the defensive practice argument.

II. THE HOUSE OF LORDS DECISION IN *CHIEF CONSTABLE OF HERTFORDSHIRE POLICE, VAN COLLE*

The facts of *Van Colle* are as follows: two days before he was due to appear in court as a prosecution witness at a theft trial, Giles Van Colle (“the deceased”) was shot and killed by the man against whom he had been summonsed to give evidence (“the accused”). In the months leading up to the murder, the deceased had been the victim of a campaign of intimidation at the hands of the accused. Although each individual incident had been reported to the police, DC Ridley, the officer in charge of the case, had failed to identify that the deceased was at risk of serious harm from the accused and thus had taken no steps to try to protect him.

Following the accused’s conviction for murder, the deceased’s parents made a formal complaint to the Police Complaints Authority about DC Ridley’s handling of the case. Their complaint was upheld and DC Ridley was subsequently found guilty by a disciplinary panel of failing to perform his duties conscientiously and diligently in connection with intimidation by the accused of both the deceased and another prosecution witness. On the basis of his vicarious liability for the acts and omissions of his officers, the deceased’s parents then brought an action under s. 7 of the Human Rights Act against the Chief Constable of Hertfordshire, alleging a breach by DC Ridley of his s. 6(1) duty to act compatibly with the deceased’s rights under Articles 2 and 8 of the European Convention on Human Rights.

Following a full trial in the High Court, Cox J. allowed the claim. She held that, on the authority of *Osman v. UK*,⁸ the state’s positive obligation under Article 2 to protect life included a positive obligation in certain circumstances to take preventative, operational measures to protect an identified individual whose life was at risk as a result of the criminal acts of a third party. As set down by the European Court of Human Rights in *Osman*, the obligation arose where it was established that the state authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of that individual. She found that, on the evidence, DC Ridley knew or ought to have

⁸ (1998) 29 E.H.R.R. 245.

known that the deceased was at special and distinctive risk of harm from the accused. In arriving at this conclusion on duty, she relied heavily on dicta from the Court of Appeal decision in *R. (A) v. Lord Saville of Newdigate*,⁹ to the effect that where the state contributes to the risk of harm to life by requiring an individual to appear as a witness, the *Osman* test of knowledge of a real and immediate risk to life is lowered and thus easier to satisfy. In holding that DC Ridley had committed a breach of that duty by failing to take appropriate measures reasonably available to him to obviate the risk to life, she relied on the findings of the disciplinary panel. Causation was duly established by evidence that the protective measures available would have had a real prospect of altering the outcome and avoiding the death. Cox J. awarded damages in the total sum of £50,000, made up of £15,000 to the deceased's estate in respect of the distress he suffered in the weeks leading up to his death and £35,000 to his parents in respect of their own grief and suffering.

On appeal, the Chief Constable challenged the judge's decisions on both liability and quantum. He argued that, on the facts as pleaded, a duty had neither been owed nor breached and that the wrong test for causation had been applied. In accordance with the ordinary common law approach to causation, he argued that it was necessary to show that "but for" the infringement of Article 2 the deceased would have survived. On the question of quantum, the Chief Constable submitted that the judge's award was too high. The Court of Appeal allowed the appeal in part. While it upheld the findings of the judge on liability, it found that the amount of damages awarded was excessive in the circumstances and it accordingly reduced the award from £50,000 to £25,000 (made up of £10,000 to the deceased's estate and £7,500 each to the claimants, the deceased's parents).

On appeal to the House of Lords, the Chief Constable focussed on the finding of a duty. Relying primarily on dicta of Lord Carswell in *In re Officer L*,¹⁰ he argued that the threshold of the *Osman* test of knowledge of a real and immediate risk to life was very high and was not variable in accordance with the type of situation in question. As such, he contended that both the High Court and the Court of Appeal

⁹ [2001] 1 W.L.R. 1249. Often referred to as the "Widgery Soldiers" case, the Court of Appeal in *Newdigate* held that the Bloody Sunday Inquiry Tribunal had a positive duty under Article 2 to take reasonable steps to protect the lives of its soldier witnesses from real and immediate dissident republican threat. In the circumstances, this involved allowing the soldiers to provide their evidence via a video link from a venue on the British mainland, rather than in person in Northern Ireland.

¹⁰ [2007] UKHL 36. This case involved an application for anonymity by police officers called to give evidence before the Robert Hamill Inquiry in Northern Ireland. The House of Lords held that the correct test for determining an entitlement to anonymity in this case was whether the pre-existing risk of death would be increased if the officers were required to give evidence without anonymity. On the basis that there was no evidence of an increased risk in this case, the Article 2 obligations of the tribunal did not require a granting of anonymity.

had erred in finding that the deceased's role as a witness had endowed him with a special status which justified the lowering of the standard *Osman* test. Accepting this contention, the House of Lords unanimously allowed the appeal in *Van Colle*. Designating the *Newdigate* decision as one confined to its own facts, Lords Bingham, Hope, Phillips, Carswell and Brown all agreed that the *Osman* test was a constant, to be applied whatever the particular circumstances of the case. The high threshold had not been met in this case, where the warning signs were even less clear and obvious than those in *Osman*, which had themselves been found inadequate to meet the test. DC Ridley could not have been expected to have anticipated that a minor case of theft, followed by a catalogue of fairly trivial incidents of possible intimidation, would result in a brutal murder.

III. THE HOUSE OF LORDS DECISION IN *SMITH (FC) v. CHIEF CONSTABLE OF SUSSEX POLICE*

The claimant in *Smith* was threatened with extreme violence over a period of months by his ex-partner, after having ended their relationship. He had repeatedly told the police about the threats, the majority of which had been sent as text messages, and had given the police both the name and address of the ex-partner, as well as the mobile number from which the relevant text messages had been sent. Despite having ample evidence and information to arrest the ex-partner, the police failed to do so. The ex-partner subsequently attacked the claimant with a claw hammer leaving him with serious and permanent injuries, and was later convicted of making threats to kill and causing grievous bodily harm with intent.

Out of time for suing for a breach of his Convention rights under the HRA (for which the limitation period is a mere 12 months¹¹), the claimant brought an action in negligence against the police for failing to protect him in the circumstances. On the application of the police, the claim was struck out at first instance as having no real prospect of success on two grounds. Simpkiss J. held that there was no sufficient relationship of proximity between the claimant and the police and that in any event, following the decision in *Hill*, public policy militated against the imposition of a duty of care in this situation. On appeal, the Court of Appeal reversed the decision of Simpkiss J., holding that the claim was not doomed to failure and that it should be allowed to proceed to trial. Sedley, Rimer and Pill L.JJ. were all of the opinion that the facts of *Smith* were potentially distinguishable from both *Hill* and the House of Lords decision in *Brooks v. Commissioner of Police* (no duty of care to victim of racist attack who was initially treated as a

¹¹ Section 7(6).

suspect in his friend's murder in the same incident).¹² In the words of Sedley L.J., the facts of *Smith* were far starker than the assumed facts of *Brooks* while, in contrast to the claimant in *Hill*, Smith's claim did not depend on his status as a member of the public facing a risk common to many others.¹³ Placing great emphasis on *Osman v. UK*, Sedley L.J. went on to say that the degree of proximity between the parties could be used to overcome the public policy considerations which would otherwise bar the claim and to create a duty of care. In his view, a very clear example of a similar approach was provided by the decision in *Swinney v. Chief Constable of Northumbria*,¹⁴ in which the Court of Appeal was prepared to recognise that a duty could be owed by the police to protect an informant whose identity they had negligently disclosed. The public interest in the protection of informants was to be regarded as outweighing the public interest in protecting the police from liability as regards their performance of their duties. In this respect, he could see no valid ground of distinction between witnesses and informers.¹⁵ The decision in *Swinney* thus provided a powerful justification for dismissing the strike-out application and allowing the claim to be determined at full trial.

Reversing the decision of the Court of Appeal, a 4 to 1 majority of the House of Lords (Lord Bingham dissenting) held that the claim in *Smith* was defeated by the defensive practice argument enshrined in *Hill*.¹⁶ Cautioning against any retreat from *Hill*, their Lordships adopted a blunt utilitarian rationale and argued that the interests of the wider community had to be prioritised over those of the individual.¹⁷ Rejecting any argument that *Hill* had to be qualified in light of subsequent developments in the law, most notably the decision in *Osman*, they placed great reliance on the decision in *Brooks* and treated the "core principle" of *Hill* as having remained intact. Addressing the relevance of *Swinney*, Lord Hope presented it as falling outside the "core principle" as it was (in his view) not concerned with the police function of investigating and suppressing crime in the public interest,¹⁸ while Lord Brown presented it as an exceptional decision based on evidence of an assumption of responsibility.

¹² [2005] 1 W.L.R. 1495. This decision is discussed in more detail on pp. 141–142.

¹³ [2008] EWCA Civ 39 at [12].

¹⁴ [1997] Q.B. 464.

¹⁵ [2008] EWCA Civ 39 at [29] per Sedley L.J.

¹⁶ [2008] UKHL 50 at [76] and [78] per Lord Hope, at [97] per Lord Phillips, at [108] per Lord Carswell and at [132] per Lord Brown. Lord Phillips also mentions the diversion of resources issue (at [89]), but fails to develop it any further.

¹⁷ *Ibid* at [75] per Lord Hope, at [106] per Lord Carswell and at [139] per Lord Brown. Lord Phillips expressed himself to be in agreement with Lord Hope's speech.

¹⁸ *Ibid* at [80]. While confirming the general applicability of the *Hill* immunity principle in the police context, Lord Steyn in *Brooks* left open the possibility of it being disapplied in exceptional cases of "outrageous" police negligence. Unfortunately he declined to provide any examples of such outrageous scenarios.

Significantly, however, Lord Phillips admitted that he had arrived at his decision with some reluctance, being of the opinion that the facts of *Smith* came close to constituting the kind of “outrageous negligence” that Lord Steyn had contemplated in *Brooks* as being outside the remit of the *Hill* principle.¹⁹ He further commented that the difficult issues of policy raised by *Smith* were a matter for Parliament to resolve rather than the courts,²⁰ thereby arguably implicitly acknowledging that the current legal position was in need of redress. Similarly, Lord Carswell was “unable to escape some feeling of concern” in applying the “core principle” to the facts of *Smith*, acknowledging that *Smith* “tested the principle severely”,²¹ while Lord Brown admitted that his decision was “not without hesitation”.²² He acknowledged that the facts of *Smith* were “really very strong”²³ and “vastly different from those either in *Hill* or in *Brooks*” and that it would be “easier to contemplate liability here than in either of those cases.”²⁴

The doubts expressed by their Lordships were undoubtedly influenced by the powerful dissenting speech delivered by Lord Bingham. He alone would have recognised the existence of a duty based on what he termed “the liability principle”, according to which: “if a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.”²⁵ On the facts of *Smith*, this principle was easily satisfied by the fact that the claimant had furnished the police with strong evidence of threats from an identified third party, and that as between the claimant and the police there was a strong relationship of close proximity created by numerous face-to-face meetings with evidence of an assumption of responsibility. Having correctly identified the remit of the so-called “core principle”, Lord Bingham did not regard his liability principle as being inconsistent with either *Hill* or *Brooks*. Crucially, he was dismissive of the defensive practice argument as applied by the majority, rightly pointing out that all that the liability principle would call for in the first instance would be a reasonable assessment of a very specific threat.²⁶ Indeed, the principle would only ever come into play in very limited scenarios.

¹⁹ *Ibid* at [101].

²⁰ *Ibid* at [102].

²¹ *Ibid* at [107].

²² *Ibid* at [127].

²³ *Ibid* at [125].

²⁴ *Ibid* at [124].

²⁵ *Ibid* at [44].

²⁶ *Ibid* at [49] and [52].

IV. THE *HILL* PRINCIPLE AND THE COMMON LAW ACTION IN NEGLIGENCE

The decision of the House of Lords in *Smith* highlights two main problems with the current judicial approach to the application of the *Hill* principle: (1) a lack of understanding as to its nature and ambit; and (2) the tenuousness of the defensive practice argument as the sole justification for the imposition of a *de facto* immunity. I have already discussed both problems at length elsewhere and do not propose to recite the same arguments in detail here.²⁷ Suffice to say that the current major obstacle to the proper interpretation of *Hill* lies in the House of Lords decision in *Brooks*. This is keenly demonstrated by *Smith*, in which even Lord Bingham, who was otherwise very sympathetic to the argument that there should be a retreat from the immunity principle, wholly misrepresented the relevance of the *Brooks* decision.

As mentioned briefly above, *Brooks* involved a negligence action against the police for alleged mistreatment of a witness to a murder resulting in psychiatric harm. The incident had been investigated by an independent body as part of a wider public inquiry into the murder and the findings of the inquiry were damning in the extreme.²⁸ Crucially for Mr Brooks, the police were found to have treated him in an improper and racially discriminatory manner. Despite such strong evidence of negligently unreasonable behaviour, the House of Lords dismissed the action for lack of duty, relying directly on the *Hill* ratio. However, the presiding Law Lords (Lords Bingham, Nicholls, Steyn, Rodger and Brown) failed to take into account the fact that the ratio of *Hill* stemmed from a third party liability action against the police and that its statements on proximity and public policy were specific to that context.

Third party liability, whereby one party is held responsible for failing to control the conduct of a third party harm-doer, may be regarded as a form of omissions liability. While the English courts are hostile to omissions liability generally, they are even more hostile to this particular subset of such liability, for it involves imposing liability on the wrong party. In third party liability cases, there is always going to be someone more obviously to blame than the defendant, and that is the actual harm-doer. Long before *Hill*, the courts had put into place special restrictive rules on the existence of affirmative third party duties to control. In *Home Office v. Dorset Yacht*,²⁹ the House of Lords set out

²⁷ See C. McIvor, "Police Immunity and the Legacy of *Hill v Chief Constable of West Yorkshire*" (2005) 21 Professional Negligence 201 and C. McIvor, "The negligence liability of child welfare authorities and policy-based immunities: A critique of recent English developments" (2006) 14 Torts Law Journal 205.

²⁸ The Stephen Lawrence Inquiry: Report of An Inquiry by Sir Macpherson of Cluny (1999; Cm. 4262-1).

²⁹ [1970] A.C. 1004.

that in addition to two relationships of close proximity (one as between the defendant and the victim, and another as between the defendant and the harm-doer), the conduct of the harm-doer resulting in damage to the victim must have been highly foreseeable in the circumstances. Where these special requirements are not satisfied, as they were not in *Hill*, then various legal and policy reasons militate against the imposition of a duty, of which a defensive practice argument is but one. For instance, where the potential class of victims covers the public at large, then a genuine floodgates concern most obviously comes in to play.

As a case involving a straightforward misfeasance, *Brooks* should not have been dealt with under the *Hill* principle. There were strong reasons for imposing a duty based on the standard *Caparo* principles of foreseeability, proximity and fair, just and reasonableness, with the decision in *Swinney* providing a particularly compelling analogy. Nevertheless, the House of Lords in *Brooks* decided that the *Hill* principle covered all negligence actions against the police in respect of their duties in investigating and suppressing crime. As will be discussed below, this labelling of a police duty as being concerned with the investigation and suppression of crime is much too broad and imprecise.

Until *Brooks* is challenged, there is little chance of the *Hill* principle being properly understood and implemented. It is very discouraging in this respect that even Lord Bingham in his speech in *Smith* got *Brooks* completely wrong. In arguing that his “liability principle” did not challenge the authority of *Brooks*, he presented *Brooks* as being a third party liability case similar to *Hill* and justified the dismissal of the action on the basis that it involved neither an identified suspect nor evidence of any threat at all to the life or physical safety of the claimant.³⁰ Somewhat bizarrely, Lord Bingham described the pleaded case as being that, whilst the attackers remained at large, Duwayne Brooks was frightened for his own safety, not least because he lived in the same locality.³¹ While it may indeed have been true that Mr. Brooks feared reprisals from the attackers, this did not form the basis of his claim in negligence against the police. It was predicated purely on the active conduct of the police in treating him as a suspect to the crime rather than as a victim and a witness.

V. LESSONS FROM AUSTRALIA

While it cannot be said that the Australian courts have actually rejected the *Hill* principle,³² they have at least shown themselves to be much

³⁰ [2008] UKHL 50 at [47].

³¹ *Ibid* at [48].

³² See, for example, *Cran v. State of New South Wales* (2004) 62 NSWLR 95 (CA).

more measured in their application of it,³³ and their rules on public authority liability generally are much more defensible as a result.³⁴ As mentioned earlier, useful reference may be made to, the recent judgment of Campbell J.A. in *State of NSW v. Tyszyk*. In this case, two police officers were sued for failing to protect a member of the public from the risk of personal injury posed by a dangling downpipe. The officers were present at the scene having responded to a telephone call from a passerby reporting the danger. Shortly after they arrived however, and before they implemented any precautions in relation to the downpipe, a tree fell across a nearby road and blocked the thoroughfare. While the officers were attempting to move the tree, the claimant pulled up in his vehicle and parked underneath the loose pipe. Upon alighting from his car, the pipe fell and struck him on the shoulder. In response to the defence argument that the police were under no duty of care in accordance with *Hill* on the basis that they were engaged in an investigation at the relevant time, Campbell J.A. stated that *Hill* was not an authority that there was immunity from liability in negligence for police officers in all circumstances.³⁵ He explained further: "It seems to me that the principle that *Hill* stands for is that, when there is a criminal at large who has demonstrated a propensity to commit crimes against a particular group of people, and that group of people is a large one, police owe no duty of care to persons who might become a victim of that criminal, concerning the strategies adopted and resources to be employed in seeking to identify and arrest that criminal."³⁶

He thus found that the defendants in *Tyszyk* could not benefit from *Hill* immunity. Nevertheless, he avoided their liability on alternative grounds which were not only simpler but entirely more convincing. Essentially, he held that as the officers had not contributed to the risk of harm, so that all they could be accused of in the circumstances was a pure omission, then in accordance with the ordinary rules governing omissions liability, it was necessary to show that they had entered into some kind of special relationship with the victim before an affirmative duty could be said to arise. In this case, there was nothing in the

³³ See P Marshall, "Police liability in negligence: The application of the *Hill* immunity in Australia" (2007) 15 Torts Law Journal 3.

³⁴ For instance, the "inconsistent duties doctrine" set out by the High Court in *Sullivan v. Moody* (2001) 207 C.L.R. 562 may be regarded as a more sophisticated version of the "fair, just and reasonable" test applied by the English courts. Although the High Court in *Sullivan v. Moody* appeared to approve of the *Hill* principle, it must be made clear that it approved only of the practice of using policy arguments to confer limited immunity. As such it relied partly on *Hill* to deny the existence of a duty on child welfare professionals towards persons accused of committing child abuse. It did not approve specifically of the defensive practice argument and it did not endorse the use of the *Hill* principle to confer a blanket immunity on the police.

³⁵ [2008] NSWCA 107 at [121].

³⁶ *Ibid* at [123].

relationship between the officers and the victim which placed the victim in a different situation to that of any other member of the public who was also at the scene at the time.³⁷ The decision in *Tyszyk* demonstrates very clearly that it is possible to limit the *Hill* principle and still protect the police from liability in certain contexts. Without wishing to state the obvious, it is perhaps similarly necessary to point out that the imposition of a duty will not always result in actual liability either, for breach and causation will still have to be proven.

Campbell J.A.'s judgment in *Tyszyk* is also important in demonstrating the significance of the act/omission distinction in the context of police negligence liability. Indeed the operation of the distinction explains why a duty of care has in the past been imposed on a police defendant. Notably, both *Knightly v. Johns*³⁸ and *Rigby v. Chief Constable of Northamptonshire*³⁹ involved positive acts on the part of the police. In the former, a police officer instructed the victim to ride his motorcycle round a blind bend in a tunnel against the flow of traffic, while in the latter the police had fired a canister of CS gas into a shop without ensuring that adequate precautions were in place to put out any fire that might result. That is not to say that a positive act on the part of the police causing harm will always result in a duty, for it may well be the case that the relevant requirement of foreseeability is not satisfied. It merely means that the existence of a duty is arguable in the ordinary way. Where, on the other hand, the police are sued for failing to prevent harm, then an exceptional affirmative duty will not arise unless there is evidence of a special kind of pre-tort relationship existing between the police and the victim. The easiest way to establish the necessary kind of pre-tort relationship is to provide evidence of an assumption of responsibility on the part of the police towards the victim. This would require personal dealings between the parties and evidence that the police had encouraged the victim to rely on their protection to their detriment. Hence the existence of the duty in *Swinney*, where the police led the claimant informant to believe that they would keep her identity protected. Other pre-tort relationships will automatically give rise to a duty to protect from foreseeable harm, such as the relationship between custodian and detainee. Cases such as *Kirkham v. Chief Constable of Greater Manchester Police*,⁴⁰ *Reeves v. Commissioner of Police of the Metropolis*⁴¹ and *Orange v. Chief Constable of Yorkshire Police*⁴² establish that the duty will even extend to protecting against the risk of self-harm, at least where the detainees'

³⁷ *Ibid* at [153].

³⁸ [1982] 1 W.L.R. 349.

³⁹ [1985] 1 W.L.R. 1242.

⁴⁰ [1990] 2 Q.B. 283.

⁴¹ [2000] 1 A.C. 360.

⁴² [2002] Q.B. 347.

self-harming tendencies have been brought to the attention of the custodial authority. Here the nature of the affirmative duty being imposed is entirely compatible with the performance of the custodial function, and there are no obvious policy arguments against liability.

Hill should no longer be treated as applying to all police conduct associated with the investigation and suppression of crime. This is what has made it such an unwieldy tool for controlling police liability, for such a category can also be made to extend to mundane administrative tasks. For example, in the Australian case of *Tame v. New South Wales*,⁴³ a police officer who was sued for allegedly causing psychiatric harm to the plaintiff after wrongly recording a blood alcohol reading as being positive resorted to arguing that he should avoid liability on the ground that his conduct fell under the rubric of a police investigation. A less convincing scenario for a defensive practice immunity argument would be hard to imagine, all the more so because the resort to the immunity argument was so unnecessary in the circumstances. The claim was a very weak one and arguably it was always destined to fail. Although the High Court was able to dismiss it on other grounds, it could arguably have been dispensed with on the simple basis that the harm in question was not reasonably foreseeable in the circumstances.

At present, immunity is the starting point for the judicial assessment of police negligence liability, while the existence of a duty is the exception. It is argued here that this situation ought to be reversed. There are too many different versions of the police function and too many different contexts in which an allegation of negligence may be raised for there to be blanket rule. There will be policy considerations relevant to some police functions which may justify a finding of no duty in certain circumstances, but the relevance of these considerations will necessarily be very fact-sensitive. As such they will need to be assessed on a case by case basis, and in accordance with the *Osman* ruling on proportionality in relation to the conferral of policy-based immunities, the policy arguments against the recognition of a duty will need to be weighed against the arguments in favour. As an entirely untested argument,⁴⁴ the defensive practice argument should never be used on its own to justify police immunity in an individual case.

VI. POLICE IMMUNITY AND THE ACTION UNDER THE HRA FOR BREACH OF AN ARTICLE 2 POSITIVE DUTY

In *Van Colle*, the House of Lords made it clear that the police would rarely be liable under the HRA for failing to protect an individual from

⁴³ (2002) 191 A.L.R. 449.

⁴⁴ See J. Morgan, "Policy reasoning in tort law: the courts, the Law Commission and the critics" (2009) 125 L.Q.R. 215.

the criminal acts of a third party. Determined not to allow all their efforts with the *Hill* principle to be undone through the creation of a backdoor route to compensation, their Lordships deliberately interpreted the existing HRA and European Court of Human Rights jurisprudence as restrictively as possible, so as to create a test for police liability under the HRA which would operate in a similar fashion to its common law cousin. Thus it is likely that only those claims which would fall within Lord Steyn's exceptional category of "outrageous negligence", as set out in *Brooks*, will pass the so-called *Osman* test of "knowledge of a real and immediate risk of harm to life". It will be a case of double or nothing, and usually nothing. Once again, however, it is argued that the House of Lords needs to adopt a more refined and context-specific approach to the determination of this form of police liability.

It is probably useful to explain briefly the legal basis for the type of HRA action taken against the police in *Van Colle*. The HRA, which came into force in October 2000, was conceived as mechanism for giving "further effect" to the European Convention on Human Rights and Fundamental Freedoms (hereafter ECHR), and to enable some direct enforcement of certain ECHR rights within the domestic courts. It is important to recognise that the Act does not make ECHR rights generally enforceable in domestic law; it merely makes them directly enforceable against public authorities. Section 6(1) of the HRA imposes a duty on public authorities to act compatibly with ECHR rights. Under section 7, an individual whose protected rights are contravened by a public authority, such as the police, is entitled to initiate proceedings directly against the authority. Section 8 empowers the court to provide a remedy in the form of damages. As a public authority, the police thus fall under the section 6 duty to act compatibly with individual ECHR rights. The ECHR right in issue in *Van Colle* was Article 2, which protects the right to life. Where the police contravene the Article 2 interests of an individual, they may be said to have breached their section 6 HRA duty, as a result of which they can be sued under section 7 HRA.

In protecting the right to life, Article 2 has been interpreted as imposing a range of different duties on the state and its organs. First and foremost, it imposes a negative duty to refrain from taking life. Secondly, however it also imposes a number of what may be termed "positive duties", which require the taking of active measures to protect life, and these may be sub-divided into (1) procedural duties; and (2) substantive duties. The primary procedural duty imposes on the state an obligation to carry out an independent public investigation into any death occurring in circumstances in which it appears that an individual's Convention rights have been, or may have been, violated

and it appears that agents of the state may be in some way implicated, whether through deliberate act or negligent omission. Usually the investigation will take the form of an inquest.⁴⁵ The Article 2 procedural duty will for example be triggered by the non-natural death of a prisoner in custody.⁴⁶ The category of Article 2 positive substantive duties must be further subdivided into: (a) a primary duty on the state to establish an effective system of criminal law to deter those who threaten life, backed up by law enforcement machinery to prevent and punish its breaches; (b) secondary duties on individual public bodies such as hospitals and prisons which are charged with the care of vulnerable persons to operate appropriate institutional systems and procedures for protecting life; and (c) specific operational duties on individual public bodies to take preventative measures to protect an individual whose life is at risk from the criminal acts of another. It is this latter operational duty which was the subject of the claim in *Van Colle*.

The operational duty was first set out by the European Court of Human Rights in *Osman v. UK*, which described it as being triggered by evidence that the relevant authorities knew or ought to have known at the time of a real and immediate risk to the life of an individual from the criminal acts of a third party. Once triggered, the duty gives rise to an obligation to take reasonable measures, within the scope of the powers of the relevant authority, which might be expected to avoid that risk, but subject to the following qualification: "... bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choice which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."⁴⁷ Thus the duty is not designed to be a particularly onerous one and there is certainly scope for a significant degree of flexibility as regards the manner of its application. And similarly to the third party negligence liability principle established by the *Dorset Yacht* case, it has a very limited remit in that it will only be in exceptional scenarios that the authorities will have actual or constructive knowledge of a specific threat to an identifiable victim from an identified third party harm-doer.

The English courts should have little to fear from the implementation into domestic law of the *Osman* operational duty. Case law subsequent to *Van Colle* may perhaps indicate that the wariness of the courts stems from a failure to appreciate its sphere of applicability. To

⁴⁵ See *R (Middleton) v. West Somerset Coroner and Another* [2004] 2 A.C. 182 on the form that an inquest must take in order to comply with the Article 2 procedural obligation.

⁴⁶ See, for example, *Keenan v. UK* (2001) 33 E.H.R.R. 913 and *Edwards v. UK* (2002) 35 E.H.R.R. 487.

⁴⁷ (1998) 29 E.H.R.R. 245 at [116].

be precise, they may be worried that the imposition of such liability on the police will necessarily lead to a plethora of Article-2-based HRA claims against various other public authorities, culminating in the creation of a general public authority duty to actively protect any individual who comes to their attention as being at risk of serious harm, either from themselves or at the hands of a third party. For in recent months, two such claims have reached the House of Lords: *Savage v. South Essex Partnership NHS Foundation Trust*⁴⁸ and *Mitchell v. Glasgow City Council*.⁴⁹ However, it is likely that the majority of such speculative claims could be easily dismissed on the basis that the operational Article 2 duty is only applicable to certain public authority functions, most notably those involving the care and control of vulnerable individuals. Thus the only bodies likely to be caught by such liability under the HRA are the police, the prison service and the NHS, particularly as regards its mental health services.⁵⁰ This is because their functions are amongst the few that are compatible with the requirements of the operational duty. Thus the action in *Savage* was rightly allowed to proceed to trial, for it was concerned with the failure of a psychiatric hospital to take reasonable steps to prevent a compulsorily detained patient from committing suicide. Moreover, there was direct Strasbourg jurisprudence on this very kind of duty in the form of the well-known case of *Keenan v. UK*.⁵¹ In deciding *Savage*, the House of Lords correctly identified that both the relationship of protection and control between the parties and the clear vulnerability of the victim were key to the application of the operational duty. Nevertheless, when the case of *Mitchell* came along, a slightly differently composed House failed to distinguish it on these obvious grounds. *Mitchell* involved a HRA action against a housing authority for failing to protect one of its tenants from serious harm at the hands of another tenant. The House of Lords should have simply dismissed the claim outright by declaring that the *Osman* operational duty was inapplicable to the facts on the basis that it was entirely incompatible with the public purpose and function of a housing authority, and with the nature of the relationship which exists between a landlord and tenant. However, Lord Rodger was the only member of

⁴⁸ [2009] 2 W.L.R. 115. See further N Allen, "Saving Life and Respecting death: A Savage Dilemma" (2009) Medical Law Review 262.

⁴⁹ [2009] 2 W.L.R. 481.

⁵⁰ Other recent Article 2 cases have involved judicial review applications, as opposed to actions for damages. See, for example, *R (A) v. Lord Saville of Newdigate, Ex p A* [2002] 1 W.L.R. 1249 and *In re Officer L and others* [2007] UKHL 36.

⁵¹ (2001) 33 E.H.R.R. 913. The application in this case was brought by the mother of a mentally-ill man who committed suicide while in prison. While the European Court of Human Rights held that the prison authority in question had a positive duty under Article 2 to protect the life of the deceased, it found that the conduct of the authority had been reasonable in the circumstances and that therefore the duty had not been breached.

the panel to even touch on either of these issues. The others simply went through the motions of applying the *Osman* test before ultimately avoiding liability on the basis of an entirely unconvincing conclusion that the requirement of knowledge of a real and immediate risk had not been satisfied. On the facts, there was very strong evidence of direct knowledge of the risk posed to the victim by the other tenant.⁵²

In short, there was no need for the House of Lords in *Van Colle* to fix the threshold for the *Osman* test of knowledge of real and immediate risk at such a high level. Although the operational duty is readily applicable to the police function, it will only ever be triggered by knowledge of a specific serious threat to a named individual, and it will only ever require the taking of reasonable steps to assess the threat and provide appropriate protection. And if the remit of the Article 2 operational duty is properly clarified by the House of Lords, then there would be no reason to fear an influx of HRA claims against other public authorities for failing to protect life.

VII. SHOULD THE COMMON LAW DEVELOP IN HARMONY WITH THE HUMAN RIGHTS ACT?

A broader issue thrown squarely into focus by the *Van Colle* and *Smith* decisions is the nature of the relationship between the common law action in negligence and the new statutory action for breach of ECHR rights under the HRA.⁵³ For if the conclusion is reached that the two ought to develop in harmony, then the decision in *Smith* is rendered all the more dubious. However, it is an issue on which opinion is currently divided, as demonstrated all too clearly by the contrasting approaches adopted in this respect by the Court of Appeal and the House of Lords in *Smith*. For while Sedley, Rimer and Pill L.JJ. were resolutely pro-harmonisation, as was Lord Bingham, Lords Hope, Phillips, Carswell and Brown were resolutely separatist.

Nevertheless, the fact that the English courts, as public authorities for the purposes of the HRA, are themselves subject to the section 6 duty not to act incompatibly with ECHR rights, which translates into a duty to develop the law in a manner that is consistent with such rights, may be cited as a very strong argument in favour of harmonisation. Moreover further support may be drawn from the decisions of both the Court of Appeal and the House of Lords in *D v. East Berkshire Community Health NHS Trust*,⁵⁴ in which, specifically in anticipation of

⁵² Eye-witnesses had previously informed the authority on various occasions that the tenant in question had been aggressive towards the victim, and had even issued him with death threats.

⁵³ See further, J. Steele's very thought-provoking discussion of some of wider unresolved issues raised by the interaction of the two causes of action: "Damages in tort and under the Human Rights Act: remedial or functional separation?" [2008] C.L.J. 606.

⁵⁴ [2004] Q.B. 558, [2005] 2 A.C. 373 (HL).

the imminent coming into force of the HRA, the seminal House of Lords decision in *X v. Bedfordshire County Council*⁵⁵ was partially overruled so as to ensure better protection of the ECHR rights of child claimants suing in negligence in respect of child protection decisions. Given the difficult history of public authority negligence liability, and in particular, the strength of disagreement invoked by the European Court of Human Rights decisions in both *Osman* and *Z v. UK*⁵⁶ it is unlikely that a consensus on the question of the relationship between the common law action in negligence and the new HRA action will be reached any time soon. It is however an important matter which warrants immediate attention and it is hoped that the decisions in *Van Colle* and *Smith* will at least compel the necessary full and open debate.

VIII. CONCLUSION

The English legal approach to police negligence liability continues to be excessively restrictive. The *Hill* immunity principle has been stretched too far, and its foundations are wearing increasingly thin. The time has now come to abandon it completely. Immunity should not be the default position in all claims against the police in negligence. While some aspects of the police function will require legal protection, this protection must be tailored to context, and if policy arguments are employed they must be fact-sensitive. For all other claims against the police, the ordinary rules of negligence are more than capable of limiting liability to all but the most deserving of cases. The existence of an alternative route to liability through the HRA, albeit one that has been strictly narrowed by an anxious House of Lords, renders the current common law position all the more precarious. The days of the immunity principle are numbered. It can only be hoped that its demise comes sooner rather than later.

⁵⁵ [1995] 2 A.C. 633.

⁵⁶ [2002] 3 E.H.R.R. 3. In *Z*, the European Court of Human Rights denied that the UK courts had applied a blanket immunity in dismissing the claims in *X v. Bedfordshire*. The decision has been interpreted both as a retreat from *Osman* and as a consistent application of *Osman*; see, for example, C. Gearty, "Osman Unravels" (2002) 65 M.L.R. 87 and C. McIvor, *Third Party Liability in Tort* (Oxford, 2006) at pp. 115–118.